

US EPA ARCHIVE DOCUMENT

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IN THE MATTER OF:

Docket No. CWA-07-2012-0007

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (“EPA”) and Timothy D. Henry, doing business as Henry Brothers Farms (“Respondent”), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22, and pursuant to Subpart I of the Consolidated Rules.

Jurisdiction

2. This CA/FO alleges that Respondent discharged pollutants into a water of the United States in violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation, is the Director of Region 7's Water, Wetlands and Pesticides Division.

4. Respondent is Timothy D. Henry, doing business as Henry Brothers Farms. Respondent's mailing address is 8 East Amador Street, Seneca, Kansas 66538-2302.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

6. The CWA prohibits the discharge of "pollutants" from a "point source" into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

7. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter "Corps"), for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States," which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include wetlands adjacent to waters of the United States.

9. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

10. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the issuance of a penalty against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

11. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located in Section 6, Township 5 South, Range 13 East, in Nemaha County, Kansas (hereinafter "the Site").

13. During August and/or September 2010, Respondent and/or persons acting on his behalf and using earth moving equipment, authorized and/or directed the dredge and/or fill of approximately 2,300 linear feet of Vermillion Creek.

14. On October 7, 2010, the Corps visited the Site and documented the discharges of dredged and/or fill material described in Paragraph 13.

15. The dredged and/or fill materials discharged by Respondent into Vermillion Creek are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

16. The discharge of the dredged and/or fill material into Vermillion Creek referenced in Paragraph 13 constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

17. The earth moving equipment referenced in Paragraph 13 constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. Vermillion Creek, referenced in Paragraph 13, is a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2, and 33 C.F.R. Part 328.

19. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the work described in Paragraph 13, nor did Respondent perform the work described in Paragraph 13 under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

FINDINGS OF VIOLATION

20. The facts stated in Paragraphs 11 through 19 above are herein incorporated.

21. Respondent’s discharges of pollutants from a point source into a water of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

CONSENT AGREEMENT

22. Respondent admits the jurisdictional allegations set forth in this CA/FO and agrees not to contest EPA’s jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

23. Respondent neither admits nor denies the factual allegations set forth in this CA/FO.

24. Respondent waives his right to contest the allegations set forth in this CA/FO and his right to appeal the Final Order portion of this CA/FO.

25. Respondent and Complainant each agree to bear their respective costs and attorney's fees incurred as a result of this action.

26. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

27. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

28. Respondent certifies by the signing of this CA/FO that, to the best of his knowledge, Respondent is in compliance with all requirements of Sections 301 and 404 of the CWA, and is scheduled to be in compliance with EPA's March 17, 2011, Administrative Compliance Order, Docket No. CWA-07-2011-0049.

29. The effect of settlement is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 28 above, of this CA/FO.

30. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty in the amount of \$12,600.

31. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Findings of Violations.

Reservation of Rights

32. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

33. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including, without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

1. Respondent shall pay a civil penalty of Twelve Thousand Six Hundred dollars (\$12,600), due thirty calendar days from the effective date of the CA/FO. Respondent shall pay

the penalty by cashier's or certified check made payable to "Treasurer, United States of America," and shall deliver the check with a transmittal that identifies the case name and docket number CWA-07-2012-0007 to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letter and the check shall be simultaneously sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to:

Erin Weekley
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

2. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

3. This Final Order shall apply to and be binding upon Respondent, his agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this CA/FO.

Effective Date

4. This Final Order shall become effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date

Erin Weekley
Assistant Regional Counsel

Date

RESPONDENT:
TIMOTHY D. HENRY

Date _____

Name

Signature

Title

IT IS SO ORDERED.

Date

Robert L. Patrick
Regional Judicial Officer